

STATE OF MICHIGAN  
COURT OF APPEALS

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ROY O. YARYAN,

Plaintiff/Counter-Defendant-  
Appellant,

v

TERRY L. YARYAN, and DOROTHY “DOT”  
YARYAN,

Defendants/Counter-Plaintiffs-  
Appellees,

and

GMAC MORTGAGE CORPORATION, and  
PROVIDENT FUNDING ASSOCIATES,

Defendants.

UNPUBLISHED  
September 15, 2015

No. 322171  
Oakland Circuit Court  
LC No. 2013-131522-CH

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Before: MURRAY, P.J., and METER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order compelling plaintiff to carry out acts necessary to complete the settlement and carry out the refinancing. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This appeal arises out of a feud between two brothers, plaintiff and defendant Terry L. Yaryan,<sup>1</sup> over an interest in real property in Rochester Hills. In June 2008, plaintiff owed defendant over \$184,000.00. On September 24, 2008, plaintiff executed a notarized document in which he agreed to sell his primary residence to defendant “for the purpose of reducing the indebtedness I owe him.” On October 21, 2008, plaintiff executed a letter agreement where he granted defendant a security interest in the home in the amount of \$184,284.60. On November 3,

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<sup>1</sup> Terry L. Yaryan is referred to as “defendant” as he is the only defendant relevant to this appeal.

2008, the agreement was recorded with the Oakland County Register of Deeds. On May 7, 2012, defendant recorded with the Register of Deeds a Notice of Claim in Real Estate pursuant to the terms of the letter agreement.

On January 8, 2013, plaintiff filed this action against defendant and others to determine each party's interest in the subject property. In his complaint, plaintiff argued that he never conveyed any interest in the subject property to defendant, never agreed to borrow money from defendant, and that the letter agreement did not create any proprietary interest for defendant. Specifically, plaintiff asked the court to: (1) declare plaintiff the owner of the subject property, free and clear of any interests of any of defendants, and (2) award relief to him as appropriate.

On December 2, 2013, the parties entered into a facilitation agreement in which plaintiff agreed to pay defendant \$50,000 and to assign to defendant his interest in the property, including the mortgage. On January 10, 2014, the trial court entered an Order Approving Conditional Settlement Agreement and Dismissal of Defendant, Dorothy Yaryan. The order provided in relevant part:

IT IS HEREBY ORDERED that the conditional settlement is approved as presented with the correction of a scrivener error that Plaintiff/Counter-defendant Roy O. Yaryan shall assign his interest, including the mortgage and lease in the house at issue . . . to Defendant/Counter-plaintiff Terry Yaryan (who in the facilitation agreement is mistakenly referred to as "Plaintiff") as soon as Provident Funding Associates approves the assignment . . . .

IT IS FURTHER ORDERED that in addition to the assignment of the house by the Plaintiff Roy O. Yaryan to the Defendant Terry Yaryan, the Plaintiff Roy O. Yaryan shall pay Defendant Terry Yaryan the sum of Fifty Thousand (\$50,000.00) Dollars as follows: Ten Thousand (\$10,000.00) within twenty-one (21) days after the approval by Provident Funding of the assignment, followed by monthly payments of at least One Thousand (\$1,000.00) beginning the first of the month after the mortgage assignment is approved, provided further that the Plaintiff may pay-off the balance early without any pre-payment penalty.

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IT IS FURTHER ORDERED that the assignment shall occur upon the approval by Provident Funding Associates of the assignment at which time the attorneys will enter an Order of Dismissal with prejudice.

\* \* \*

IT IS FURTHER ORDERED that the settlement condition that Plaintiff's assignment of the mortgage be approved by Provident Funding Associates shall be obtained **not later than April 1, 2014**.

Plaintiff objected to the court implementing the terms of the agreement because the mortgage holder, Provident Funding Associates L.P. (Provident), had notified defendant that it would not allow defendant to assume the mortgage. In response, defendant filed a motion "to compel

actions necessary to complete the settlement and carry out the refinancing.” Defendant indicated that Provident approved a scenario where defendant would refinance and pay off the balance of plaintiff’s existing mortgage. Plaintiff opposed the motion by arguing that refinancing was not part of the agreement entered by the court, and that he had only agreed to the assignment because he did not believe that defendant “would be a suitable candidate to assume the mortgage by Provident.” Plaintiff also argued that defendant was attempting to change the terms of the agreement, and that the facilitator had forced plaintiff to agree to the settlement. In accordance with its oral ruling, the trial court granted defendant’s motion and entered an order compelling plaintiff to carry out acts necessary to complete the settlement and carry out the refinancing.

## II. ANALYSIS

According to plaintiff, this dispute is fundamentally about how the trial court enforced the parties’ settlement agreement despite a condition of the agreement allegedly not being fulfilled. A settlement agreement is considered a contract, and is to be construed as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). We review de novo the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

A condition precedent in a contract is a fact or event that the parties intend to occur before the right to performance exists. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007). “ ‘If the condition is not fulfilled, the right to enforce the contract does not come into existence.’ ” *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953) (citation omitted); See also *Harbor Park Market, Inc*, 277 Mich App at 131. Whether a provision in a contract is a condition the nonfulfillment of which excuses performance (i.e., is a condition precedent) depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the surrounding circumstances when they executed the contract. *Knox*, 337 Mich at 118.

The settlement agreement clearly indicated that Provident’s approval of the assignment of the mortgage to defendant was a condition of the agreement. The settlement agreement clearly indicated that “settlement [is] conditioned upon approval of assignment to [d]efendant by Provident.” Additionally, the trial court’s order approving the settlement agreement provided, in part, that “if the assignment of the mortgage is not approved, the parties shall notify the court and request a pretrial conference and a trial date shall be set.” Based on the language employed by the parties, the condition regarding the mortgage was a condition precedent to the contract between the parties.

But what is the condition? Plaintiff argues that based on the plain language of the agreement, the condition was Provident approving the assignment of plaintiff’s mortgage to defendant, which plaintiff claims did not occur. As such, plaintiff contends that the trial court erred in enforcing the terms of the settlement agreement because it did so despite the condition not being fulfilled. Plaintiff is incorrect.

Under Michigan law, a mortgage “is a lien on real property intended to secure performance or payment of an obligation.” *Prime Financial Services v Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008). Thus, “a transfer of a mortgage without the underlying obligation ‘is a mere nullity.’ ” *Id.* at 257, quoting *Ginsberg v Capitol City Wrecking Co*, 300

Mich 712, 717; 2 NW2d 892 (1942). As a result, what was transferred under the plain terms of the agreement was not simply the Provident note, but also the underlying debt obligation. The trial court therefore reasonably concluded that the condition upon which the agreement was contingent was not the assignment of the debt obligation owed under the mortgage. See *Knox*, 337 Mich at 118. Hence, the condition was satisfied because Provident did approve the transfer of the debt (“assignment of the mortgage”) from plaintiff to defendant when it accepted payoff of plaintiff’s existing mortgage, and discharging it thereafter.

Not only does the plain language of the agreement support this conclusion, but in looking to the circumstances and interactions leading up to the settlement agreement’s execution to determine if a condition precedent exists, so does the record. At a hearing on December 12, 2013, where plaintiff sought a determination of the parties’ interests in the subject property, plaintiff’s counsel confirmed that the condition meant that “the [d]efendant be able to accept the mortgage.” He also stated that “[taking the mortgage] is the material condition of the settlement . . . to get the house . . . .” Importantly, defendant’s counsel recognized that the condition could be met through a refinancing when he stated that “[w]e have talked with Provident, Provident is - - is listening to various mechanisms for us to carry out this settlement and achieve their needs to approve this settlement, one of which is basically attempting to re-mortgage the property and pay off his mortgage and then set a new mortgage . . . . The payment of the mortgage would [sic] become his once the assignment occurs.” Plaintiff’s counsel did not object to or otherwise challenge defendant’s view of this particular way (refinancing) to satisfy the condition.

The trial court acknowledged as much when it recognized that the exclusive purpose of the agreement was for defendant to assume the debt on the house, thus relieving plaintiff of any obligation on the house being transferred to defendant:

Now we keep going round and round and round because you don’t want to accomplish what was agreed upon, which was that Mr. Roy Yaryan would basically give up that house and the obligations with that house to his brother, Terry, and Terry would assume the responsibility of taking care of the debt obligations and he would receive the property. That’s the bottom line here. No matter how you phrase it, that’s the bottom line.

The record—both the plain terms of the agreement and separately the circumstances surrounding the agreement—clearly demonstrates that the settlement agreement was premised on defendant’s ability to relieve plaintiff of his obligations under the mortgage. In other words, the condition of the settlement agreement was that plaintiff was to transfer his interest in the subject property, along with the existing mortgage, to defendant, so long as defendant was able to pay the mortgage and relieve plaintiff of that obligation. Furthermore, when defendant refinanced and paid off the Provident mortgage in full, plaintiff was relieved of his obligations under the mortgage. In other words, plaintiff’s obligations under the settlement agreement were the same whether defendant had assumed the mortgage or refinanced it.

### III. CONCLUSION

For the reasons stated herein, we affirm the trial court's order compelling plaintiff to carry out acts necessary to complete the settlement and carry out the refinancing. Defendant, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Patrick M. Meter

/s/ Donald S. Owens